Inter Maritime Management Sdn Bhd v Kai Tai Timber Co Ltd, Hong Kong

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-36 OF 1994
GOPAL SRI RAM, SITI NORMA YAAKOB AND MAHADEV SHANKAR JJCA
21 JANUARY 1995

Civil Procedure *— Stay of proceedings — Step in the proceedings — Whether making objection to application for injunction amounts to a step in the proceedings*

Civil Procedure *— Stay of proceedings — Foreign jurisdiction clause — Whether binding on parties — Discretion of judge — Principles applicable — Difference between forum non conveniens and foreign jurisdiction clause*

On 16 August 1993, the ship 'The Interhill King' ('the vessel'), owned by the appellant, set sail for Hong Kong carrying a cargo of timber belonging to the respondent. The cargo had been loaded at Kuala Mukah, Sarawak. The vessel never arrived at its destination and sank in the South China Sea. The vessel was a vessel registered in Malaysia and the appellant was a company incorporated in Malaysia. The respondent issued a writ in personam against the appellant claiming damages for the negligent loss of its property and obtained an ex parte injunction to restrain the appellant from dissipating its assets not exceeding US$1m with a provision for renewal at the end of two weeks. The appellant applied to stay the action relying on cl 3 in the bill of lading by which the parties agreed to the contract being governed by Japanese law and to their disputes being adjudicated upon by the District Court of Tokyo. When the respondent applied to renew the injunction, the appellant's counsel did not resist the application on the ground that that would amount to taking a step in the action which would therefore prejudice his application for a stay. The High Court judge dismissed the appellant's application to stay the action on the grounds, inter alia, that the respondent resided in Malaysia, the vessel was registered here, it was cheaper to transport the Filipino crew members to Malaysia than to Japan and the respondent could have difficulty enforcing a judgment obtained in Japan. The appellant appealed.

Held, dismissing the appeal:

(1) The resistance offered by a defendant to the grant or the renewal of an injunction against him is a defensive measure not amounting to a step in an action. The position is the same whether the application to stay an action is made on the ground that there is an agreement to refer disputes to arbitration or on the ground that there is an exclusive jurisdiction or forum selection clause.

(2) The relative merits of having a trial either in this country or in the agreed foreign tribunal as well as the competing considerations

A that have to be weighed when deciding whether to give effect to a forum selection clause are matters pre-eminently within the province of the trial judge. An appeal should be rare and the court will be slow to interfere with the judge's discretion.

(3) The judge committed no error in the way in which he stated the B law. He was conscious of the burden on the respondent to produce strong grounds to displace the forum that had been selected and had asked himself all the right questions. Therefore, this was not a case for appellate interference.

(4) The court refused to follow the American approach to forum C selection clauses due to the juridical impossibility of incorporating it into our common law. In America, a judge has no discretion when faced with a forum selection clause and may only refuse a stay on grounds sufficient to avoid a contract. Furthermore, circumstances sufficient to avoid a contract under American law may be inadequate to vitiate a contract under our *lex fori* because D the contents of vitiating elements, such as fraud and undue influence, differ between Malaysia and the United States.

(5) In an application for a stay of proceedings based on forum non conveniens, the defendant must show that a forum elsewhere is more convenient to adjudicate the dispute and demonstrate why E the suit should not proceed in the place where it was commenced. However, where there is a forum selection clause and the plaintiff brings an action in breach of the agreement, the burden is on the plaintiff to show why the agreement should not be honoured. The court is not bound to give effect to such an agreement since consent cannot create or confer jurisdiction upon a court that F has none and it also cannot oust the jurisdiction of a court. In any event, the matters that are relevant to the exercise of discretion in both cases are almost identical.

[Bahasa Malaysia summary

G Pada 16 Ogos 1993, kapal 'The Interhill King' ('kapal itu'), kepunyaan perayu, telah memulakan pelayarannya ke Hong Kong dengan muatan kargo kayu balak kepunyaan responden. Kargo tersebut telah dimuat di Kuala Mukah, Sarawak. Kapal itu tidak sampai ke destinasinya dan karam di Laut China Selatan. Kapal itu adalah sebuah kapal yang didaftarkan di Malaysia dan perayu adalah syarikat yang H diperbadankan di Malaysia. Responden telah mengeluarkan writ in personam ke atas perayu untuk menuntut ganti rugi atas kehilangan hartanya melalui kecuaian perayu dan memperolehi injunksi ex parte untuk menahan perayu daripada melesapkan asetnya yang tidak melebihi US$1 juta dengan peruntukan pembaharuan pada akhir I tempoh dua minggu. Perayu membuat permohonan untuk penggantungan tindakan tersebut bergantung pada fasal 3 dalam bil muatan di mana pihak-pihak yang terlibat bersetuju agar kontrak tersebut dikuasai oleh undang-undang Jepun dan pertikaian di antara mereka dihakimi oleh Mahkamah Daerah Tokyo. Apabila responden

memohon untuk membaharui semula injunksi tersebut, peguambela bagi pihak perayu tidak menentang permohonan itu atas alasan bahawa ia akan merupakan satu langkah dalam tindakan tersebut (a step in the action) yang akan menjejaskan permohonan beliau untuk penggantungan itu. Hakim Mahkamah Tinggi telah menolak permohonan perayu untuk penggantungan tindakan tersebut atas alasan, antara lain, bahawa responden menetap di Malaysia, kapal itu didaftarkan di sini, adalah lebih murah untuk membawa anak kapal Filipina ke Malaysia daripada ke Jepun dan responden mungkin mengalami kesulitan menguatkuasakan perintah yang diperolehi di Jepun. Perayu telah membuat rayuan.

Diputuskan, menolak rayuan itu:

(1) Tentangan defendan terhadap pemberian atau pembaharuan injunksi terhadapnya adalah suatu langkah membela diri yang tidak merupakan langkah dalam sesuatu tindakan. Kedudukannya adalah sama sama ada permohonan penggantungan itu dibuat atas alasan bahawa terdapat satu persetujuan untuk merujuk pertikaian kepada timbangtara mahupun atas alasan terdapat satu fasal bidang kuasa eksklusif atau pemilihan forum.

(2) Merit mengadakan perbicaraan di negara ini ataupun di tribunal asing yang dipersetujui serta pertimbangan bersaing yang harus dipertimbangkan apabila menentukan sama ada untuk memberi keberkesanan kepada fasal pemilihan forum adalah perkara yang sama sekali dalam bidang kuasa hakim perbicaraan. Rayuan sepatutnya jarang diadakan dan mahkamah akan berhati-hati untuk mencampurtangan dalam soal budi bicara hakim.

(3) Hakim itu tidak melakukan kesilapan dalam cara beliau menyatakan undang-undang. Beliau sedar akan beban responden untuk menghasilkan alasan kukuh supaya membatalkan forum yang telah dipilih dan telah menanya dirinya segala soalan yang betul. Oleh yang demikian, ini bukanlah satu kes yang memerlukan campurtangan mahkamah rayuan.

(4) Mahkamah enggan mengikut pendekatan Amerika terhadap fasal pemilihan forum oleh kerana kerumitan juridikal menggabungkan pendekatan itu ke dalam common law kami. Di Amerika, hakim tidak mempunyai budi bicara apabila dihadapkan dengan fasal pemilihan forum kerana beliau hanya boleh menolak penggantungan atas alasan yang mencukupi untuk mengelakkan sesuatu kontrak. Walau bagaimanapun, keadaan yang mencukupi bagi mengelakkan kontrak di bawah undang-undang Amerika mungkin tidak memadai bagi menjadikan kontrak itu tidak sah di bawah *lex fori* kami kerana isi kandungan unsur yang menjadikan sesuatu kontrak tidak sah, seperti fraud dan pengaruh tidak wajar, adalah berbeza di antara Malaysia dan Amerika Syarikat.

(5) Dalam sesuatu permohonan penggantungan prosiding berdasarkan forum non conveniens, defendan perlu menunjukkan bahawa sesuatu forum di tempat lain adalah lebih sesuai untuk

menghakimi pertikaian itu dan juga menunjukkan mengapa tindakan itu tidak harus berlangsung di tempat di mana ia dimulakan. Walau bagaimanapun, di mana terdapat fasal pemilihan forum dan plaintif membawa suatu tindakan memungkiri perjanjian itu, beban adalah atas plaintif untuk menunjukkan mengapa perjanjian itu tidak harus ditunaikan. Mahkamah tidak terikat untuk memberi keberkesanan kepada perjanjian seperti itu memandangkan keizinan tidak boleh mewujudkan atau pun mengurniakan bidang kuasa ke atas mahkamah yang tidak mempunyai bidang kuasa dan ia juga tidak boleh menyingkirkan bidang kuasa sesuatu mahkamah. Bagaimanapun, perkara yang relevan kepada penggunaan budi bicara dalam kedua-dua kes adalah hampir serupa.]

Notes

For cases on stay of proceedings based on foreign jurisdiction clauses and forum non conveniens, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 3146–3150.

Cases referred to

Aldred v Australian Building Industries Pty Ltd (1987) 89 FLR 68 (refd)

Amerco Timbers Pte Ltd v Chatsworth Timber Corp Pte Ltd [1977] 2 MLJ 181 (refd)

American Express Bank Ltd v Mohamed Toufic Al-Ozeir & Anor [1995] 1 MLJ 160 (refd)

Apple Computer Inc v Apple Corps SA [1990] 2 NZLR 598 (refd)

Asian Plutus, The [1990] 2 MLJ 449 (refd)

Benarty, The [1984] 3 All ER 961; [1984] 2 Lloyd's Rep 244 (refd)

Bremen v Zapata Off-Shore Co (1972) 407 US 1 (distd)

Carbon Black Export Inc v The SS Monrosa 254 F 2d 297 (refd)

Carvalho v Hull, Blyth (Angola) Ltd [1979] 3 All ER 280; [1979] 1 WLR 1228 (refd)

Dynamics Corp v The Citizens & Southern National Bank 356 F Supp 991 (1973) (refd)

El Amria, The [1981] 2 Lloyd's Rep 119 (folld)

Eleftheria, The [1970] P 94; [1969] 2 All ER 641 (folld)

Fehmarn, The [1958] 1 All ER 333; [1958] 1 WLR 159 (folld)

Frank Pais, The [1986] 1 Lloyd's Rep 529 (folld)

G & E Auto Brokers v Toyota Canada Inc (1981) 117 DLR (3d) 707 (refd)

Globus Shipping & Trading Co (Pte) Ltd v Taiping Textiles Bhd [1976] 2 MLJ 154 (folld)

Green v Australian Industrial Investment Ltd (1989) 90 ALR 500 (refd)

Hindustan Zinc Ltd v Associated Metals & Minerals Corp AIR 1983 Bom 131 (refd)

Kislovodsk, The [1980] 1 Lloyd's Rep 183 (refd)

Leigh-Mardon Pty Ltd v PRC Inc (1993) 44 FCR 88 (refd)
Lister v Stubbs (1890) 45 Ch D 1; [1886–90] All ER Rep 797 (refd)
Maldive Importer, The [1986] 1 MLJ 12 (refd)
New Great Insurance Co of India v ASA Kampagni AIR 1964 Bom 71 (refd)
Nute v Hamilton Mutual Insurance Co (1856) 72 Mass 174 (refd)
Pacific Centre v United Engineers (Malaysia) Bhd [1984] 2 MLJ 243 (refd)
Pope Manufacturing Co v Gormully 144 US 224 (refd)
Ramji Dayawala & Sons (P) Ltd v Invest Import AIR 1981 SC 2085 (refd)
Roussel-Uclaf v GD Searle & Co Ltd [1978] 1 Lloyd's Rep 225 (folld)
Sabah Gas Industries Sdn Bhd v Trans Samudera Lines (S) Sdn Bhd [1993] 2 MLJ 397 (refd)
Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 MLJ 97 (folld)
Trendtex Trading Corp v Credit Suisse [1980] 3 All ER 721; [1982] AC 679 (HL) (refd)
Vishva Apurva, The [1992] 2 SLR 175 (not folld)
Williams v Society of Lloyds [1994] 1 VR 274 (refd)
Zainal Abidin v Century Hotel Sdn Bhd [1982] 1 MLJ 260 (refd)

Legislation referred to

Contracts Act 1950
Debtors Act 1957 s 19
Carriage of Goods by Sea Act 1957 [Japan]
Hague Rules

Appeal from: Civil Suit No D4–22–24–1994 (High Court, Kuala Lumpur)

Ong Chee Kuan (*Phang Chi Ming* with him) (*Lee Ong & Kandiah*) for the appellant.
M Nagarajah (*Shook Lin & Bok*) for the respondent.

Cur Adv Vult

Gopal Sri Ram JCA (delivering the judgment of the court):

Introduction

We heard and dismissed this appeal on 17 January 1995 without requiring counsel for the respondent to address us. When the unanimous decision of this court was announced, counsel were informed that reasons would be given. These are now produced.

The background

On 16 August 1993, the vessel 'The Interhill King', owned by the appellant, set sail for Hong Kong. It carried on board a cargo of about 4.8m cubic

A metres of timber that had been loaded at the port of Kuala Mukah, Sarawak. The property in that cargo was with the respondent. The vessel never arrived at its destination. By the account of both litigants before us, it now lies at the bottom of the South China Sea. So does all the cargo that it carried. The respondent formed the view that the appellant was to blame for this state of affairs. It issued a writ in personam against the appellant B on 7 January 1994, claiming damages for the negligent loss of its property. At this point, I mention two other matters for completeness. The first is the fact that the 'Interhill King' is a vessel registered in Malaysia. The second is the fact that the appellant is a company incorporated in this country.

C On the same date that the writ issued, the respondent took out a summons for an injunction to restrain the appellant from dissipating its assets not exceeding US$1m and obtained it ex parte on 19 January 1994 with a provision for its renewal at the end of two weeks. As it transpired, this injunction was renewed without opposition from the appellant. The D appellant's reason for not opposing the renewal of the injunction will be dealt with in a moment. But I wish to digress for a while.

The Mareva jurisdiction

The injunction which the respondent obtained is termed a 'Mareva E injunction'. Initially there was some doubt as to whether we could issue such injunctions because of the express provision in s 19 of our Debtors Act 1957 that enables a plaintiff to attach a defendant's property before judgment and also because of the decision in *Lister v Stubbs* (1890) 45 Ch D 1; [1886–90] All ER Rep 797. That doubt was laid to rest by the decision of the Federal Court in *Zainal Abidin v Century Hotel Sdn Bhd* F [1982] 1 MLJ 260. The jurisdiction is now well entrenched and has been exercised on numerous occasions.

While on this topic, I would also call to mind the illuminating judgment of Edgar Joseph Jr J (as he then was) in *Pacific Centre v United Engineers (Malaysia) Bhd* [1984] 2 MLJ 243, in which, apart from suggesting G an alternative basis for the Mareva jurisdiction in this country, he has set out the important differences (and this is the only reported case in which this has been done) between that kind of injunctive relief and the pre-judgment attachment of debts under statute.

Taking a step in the action

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I now return to the mainstream. On 12 February 1994, the appellant took out a summons to stay the action relying on the exclusive jurisdiction clause in the bill of lading that was issued by it to the respondent in respect of the cargo in question. I will say more about this clause in a moment. But before I do that, there is one point of importance that I must mention. It I has to do with the appellant's failure to resist the respondent's application to renew the injunction that had been obtained.

In the course of his address to the judge at first instance, counsel who appeared for the appellant in the court below — not Mr Ong — said that

he did not do so because it would amount to a step in the action and would therefore prejudice his application for a stay. In my judgment, counsel was plainly wrong in the view that he took.

The resistance offered by a defendant to the grant or the renewal of an injunction against him is a defensive measure not amounting to a step in an action. That this is the position in applications to stay an action on the ground that there is an agreement to refer disputes to arbitration has been settled by the decision of the Supreme Court in *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97 [at p 112] where the following passage in the judgment of Graham J, in *Roussel-Uclaf v GD Searle & Co Ltd* [1978] 1 Lloyd's Rep 225 at p 232 was applied:

> On the whole, I think that the statute is contemplating some positive act by way of offence on the part of the defendant rather than merely parrying a blow by the plaintiff, particularly where the attack consists in asking for an interlocutory injunction. Such a remedy against a defendant might well be necessary whether the action was ultimately stayed or not, in order to preserve, for example, the property the subject of the action in the meantime; and, as a practical matter, in such a case it would not be of importance whether the application to stay was made before, at the same time as or after the application for an injunction. Here it is not suggested that the plaintiffs were in any way embarrassed or taken by surprise by the making of the application to stay at the date at which it was made and I see no reason to penalize Searle (UK) in that respect. I do not think the present case is covered by the authority of *Pitcher*'s case [1940] 1 All ER 151 and it seems to me that the reasoning of Stirling J in the *Zalinoff* case [1898] 2 Ch 92 is more pertinent to the circumstances here where an application for an injunction was being resisted.
>
> I therefore, hold, in the circumstances of the present case, that Searle (UK) did not take any step in the action between the date of appearance and delivery of pleading such as to debar them from relief by way of stay. I therefore hold on this second ground also that a stay ought to be granted in respect of the action against both defendants.

It is my view that the law has reached a stage where it may be quite safely said that there is really no difference in principle between cases where an application to stay an action is made on the ground that there is an exclusive jurisdiction clause and those cases where a stay is sought upon the ground that there is in existence an agreement to refer disputes to arbitration. According to the authorities I have perused, a plaintiff in either case is required to show strong grounds why he should not honour the bargain he made with the defendant. Also, in both kinds of case the court has a discretion to permit litigation to continue before it.

Of course, when it comes to the factors that have to be taken into account, these will vary according to the circumstances although cases may and do occur where the same set of circumstances may be relevant to the grant or refusal of applications for a stay based on different grounds. This will become self-evident much later in this judgment when I come to deal with the question of the burden upon the respondent.

The application to stay

Returning now to the appellant's application for a stay, this came up before Abdul Malek J, on 4 July 1994. After hearing arguments, he reserved his decision to 15 August 1994. However, having obviously arrived at a concluded view well before that date, he advanced the delivery of his decision to 27 July 1994 at which time he dismissed the appellant's summons.

The forum selection clause

It is appropriate to now deal with the clause in the bill of lading on which the appellant grounded its summons. It is what English textbook writers, and, it would appear even judges from other parts of the Commonwealth, term an exclusive jurisdiction clause. American jurists refer to it as a forum selection clause. I must confess my own preference for the latter terminology as it appears to be more accurate a description of such clauses. Henceforth, I shall use that term.

Forum selection clauses are commonplace in commercial contracts, especially those with an international flavour. By that clause the parties in this case agreed to the contract being governed by Japanese law and to their disputes being adjudicated upon by the District Court of Tokyo. The judge took the trouble to reproduce the clause in his judgment. Because of its importance I should do likewise. It is cl 3 in the bill of lading and this is what it says:

> Governing law and jurisdiction
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> The contract evidenced by or contained in this bill of lading shall be governed by Japanese law except as may be otherwise herein, and any action thereunder shall be brought before the Tokyo District Court in Japan.

The judge also set out the usual clause paramount which makes the contract subject to the Hague Rules as enacted in Japan as the Carriage of Goods by Sea Act 1957. I do not propose to recite it. He came to the conclusion that the action should, despite the parties having selected Japan as the forum of their choice, continue in this country.

The judgment

The nature of the criticism levelled by the appellant against the judge's approach to the case calls for the reproduction of the relevant passages from his written judgment. This is what he said:

> The authorities cited lean towards the grant of an order for a stay of proceedings where there is a breach of an exclusive jurisdiction clause but qualifies (sic) the position by stating that it is essentially a matter of discretion if the facts and circumstances are so strong as to amount to a good reason for the court to hold otherwise.
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> On the facts of this case, although there is an exclusive foreign jurisdiction clause for the dispute to be heard in Japan, it is not disputed that the defendant is resident in Malaysia and the vessel is registered here. It is also

conceded that the cargo was loaded in East Malaysia and the vessel was en route to Hong Kong. Evidencewise, it would be cheaper to transport the Filipino crew members here than to Japan. All other relevant documentary evidence was also readily available here. The plaintiff could also have some difficulty in enforcing a judgment obtained in Japan. Further, there is also some confusion as to whether the Hague Rules or the Hague-Visby Rules apply in Japan to determine the limit of liability.

On these considerations, it was my view that the matter could and would be more appropriately dealt with here than in Japan. Accordingly, I had dismissed the defendant's application with costs.

The appellant complains that these passages contain a misdirection by the learned judge.

The submissions of counsel

Before us, Mr Ong submitted that the judge was wrong in the way in which he assessed the competing considerations when deciding that the action should continue before him. The judge, said counsel, merely weighed these on a balance. This, he submitted was an exercise more appropriate to a case governed by the doctrine of forum non conveniens but entirely unsuitable to a case such as the present where there is a forum selection clause.

Counsel argued that the matters that are to be taken into account by a court when exercising discretion whether to stay an action in a case where there is a forum selection clause are different from those which should be considered when deciding whether a plaintiff's complaints might more conveniently be dealt with in a forum elsewhere.

In support of his argument, counsel placed reliance upon the decision of the Singapore Court of Appeal in *The Vishva Apurva* [1992] 2 SLR 175, and in particular, upon the following passages in the judgment of Chan Sek Keong J at p 189 of the report:

> In our view, FA Chua J failed to give sufficient weight to the exclusive jurisdiction clause. We should accord full recognition to exclusive jurisdiction clauses which are freely negotiated between the parties and which are unaffected by 'fraud, undue influence or overweening bargaining power' (see Warren Burger CJ in *Bremen v Zapata Off-Shore Co* (1972) 32 L Ed 2nd 514 at p 522), unless the plaintiff who seeks to break his contractual obligation can 'show that trial in the contractual forum will be [so] gravely difficult and inconvenient that he will, for all practical purposes, be deprived of his day in court. Absent that there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain' (at p 525).
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> *In the case before us, the respondents had failed to discharge the burden of showing that it was unfair, unjust or unreasonable for the court to hold them to their obligations under the relevant bills of lading.* We were of the view, with respect, that FA Chua J had erred in the exercise of his discretion. We accordingly allowed the appeal with costs. (Emphasis added.)

Mr Ong invited us to follow the approach in *The Vishva Apurva* and, on that basis, to reverse the judge in this case. This is really an invitation to

A import the ratio in *Bremen v Zapata Off-Shore Co* (1972) 407 US 1 into our common law.

I regret that I must decline the invitation of counsel. There are compelling reasons for my refusal to apply the ratio in *Bremen v Zapata Off-Shore Co* which jurists in the United States call the 'Zapata test'. (See
B *Conflict of Laws* by Scoles and Hay (1984 Ed) at p 353 et seq.) I will state my reasons. But before I do so, it is necessary for me to deal with what I perceive to be the principles that apply to this appeal.

The applicable law

C The relevant law on the subject has, I believe, been settled by the decision of the Federal Court in *Globus Shipping & Trading Co (Pte) Ltd v Taiping Textiles Bhd* [1976] 2 MLJ 154 where Gill CJ (Malaya), said [at p 155]:

> As regards the general principles in relation to jurisdiction where parties have agreed to submit exclusively to a foreign jurisdiction, in the case of *The*
D *Fehmarn* [1957] 2 All ER 707, Wilmer J, said at p 710:
>
> > 'Where there is an express agreement to a foreign tribunal, clearly it requires a strong case to satisfy this court that that agreement should be over-ridden and that the proceedings in this country should be allowed to continue. However, in the end it is, and must necessarily be, a matter for the discretion of the court, having regard to all the circumstances of
> E the particular case.'

When it went up to the Court of Appeal [1958] 1 All ER 333 at p 335; [1958] 1 WLR 159 at p 161, Lord Denning said:

> The next question is whether the action ought to be stayed because of the provision in the bill of lading that all disputes are to be judged by the
> F Russian courts. I do not regard this provision as equal to an arbitration clause, but I do say that the English courts are in charge of their own proceedings: and one of the rules which they apply is that a stipulation that all disputes should be judged by the tribunals of a particular country is not absolutely binding. Such a stipulation is a matter to which the courts of this country will pay much regard and to which they will normally give effect,
> G *but it is subject to the overriding principle that no one by his private stipulation can oust these courts of their jurisdiction in a matter that properly belongs to them.* (Emphasis added.)

In a later part of his judgment ([1976] 2 MLJ 154 at p 155), the learned Chief Justice of Malaya reproduced the following passage from the judgment
H of Brandon J, as he then was, in *The Eleftheria* [1970] P 94 at p 99; [1969] 2 All ER 641 at p 645:

> The principles established by the authorities can, I think, be summarized as follows: (1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within its jurisdiction, is
> I not bound to grant a stay but has a discretion whether to do so or not. (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (3) The burden of proving such strong cause is on the plaintiffs. (4) In exercising its discretion the court should take into account all the circumstances of the particular case. (5) In particular,

> but without prejudice to (4), the following matters, where they arise, may properly be regarded: (a) in what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts; (b) whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects; (c) with what country either party is connected, and how closely; (d) whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages; (e) whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would: (i) be deprived of security for their claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in England; or (iv) for political, racial religious or other reasons be unlikely to get a fair trial.

Gill CJ then concluded his view in the following words [at p 156]:

> It would seem abundantly clear from the authorities that where a cause of action in respect of any dispute in relation to a contract arises and is therefore properly within its jurisdiction, the court has a discretion whether or not to adjudicate upon the claim in the action even where the parties have agreed to refer such dispute to a foreign court, and that the question of jurisdiction is quite separate from the question of the proper law of the contract to be applied.

The Eleftheria has been applied more recently by our Supreme Court in *Seloga Jaya* [1994] 2 MLJ 97, and by Syed Ahmad Idid J, in *Sabah Gas Industries Sdn Bhd v Trans Samudera Lines (S) Sdn Bhd* [1993] 2 MLJ 397. It has been followed in Australia (see *Aldred v Australian Building Industries Pty Ltd* (1987) 89 FLR 68; *Green v Australian Industrial Investment Ltd* (1989) 90 ALR 500; *Leigh-Mardon Pty Ltd v PRC Inc* (1993) 44 FCR 88; and *Williams v Society of Lloyds* (1994) 1 VR 274), in New Zealand (see *Apple Computer Inc v Apple Corps SA* [1990] 2 NZLR 598) and in Canada (see *G & E Auto Brokers v Toyota Canada Inc* (1981) 117 DLR (3d) 707).

Additionally, the decision in *Globus Shipping* has been applied by our Federal Court in a yet unreported case concerning an application based on the forum non conveniens doctrine. (See *American Express Bank Ltd v Mohamed Toufic Al-Ozeir & Anor* [1995] 1 MLJ 160.)

Indian courts, before whom this subject has arisen on numerous occasions in the context of arbitration clauses under which the parties have agreed to the alternate resolution of their disputes in a foreign country, have consistently applied the dictum of Lord Denning in *The Fehmarn* and refused a stay of suits filed in defiance of the agreement to arbitrate abroad. (See *New Great Insurance Co of India v ASA Kampagni* AIR 1964 Bom 71; *Ramji Dayawala & Sons (P) Ltd v Invest Import* AIR 1981 SC 2085; *Hindustan Zinc Ltd v Associated Metals & Minerals Corp* AIR 1983 Bom 131.)

Before I proceed any further, I must express my gratitude to my learned brother Mahadev Shankar JCA, for having drawn my attention to the Indian authorities from which I have obtained much guidance upon the question at hand, although I am not prepared to go so far as to agree with all that they have said.

The development after The Eleftheria

Sitting as a member of the English Court of Appeal in *The El Amria* [1981] 2 Lloyd's Rep 119, Brandon LJ reaffirmed all that he had said in *The Eleftheria*, adding the qualification that judges should not be drawn into making a comparison between the system of law administered by English courts on the one hand and foreign courts on the other. I think that the same holds true in our jurisdiction.

In *Carvalho v Hull, Blyth (Angola) Ltd* [1979] 3 All ER 280 at p 287; [1979] 1 WLR 1228 at p 1238 it was emphasized that the list provided by Brandon J in *The Eleftheria* is not meant to be exhaustive.

It has also been said that it is no answer for a plaintiff who has agreed to trial in a particular foreign country to subsequently argue that he would suffer some procedural or substantive disadvantage under the *lex fori* of that country: *Trendtex Trading Corp v Credit Suisse* [1980] 3 All ER 721 at p 736, affirmed by the House of Lords in [1982] AC 679; *The Kislovodsk* [1980] 1 Lloyd's Rep 183 at p 186; *The Benarty* [1984] 3 All ER 961; [1984] 2 Lloyd's Rep 244 at p 251.

Having carefully read the English cases decided after 1969, I am left unimpressed that any significant learning has been added to this area of the law since *The Eleftheria*. In fact, I share the view of Nader J in *Aldred* that 'the various cases seem to apply the same test although they express it in different ways'.

The position in Singapore

Prior to the decision in *The Vishva Apurva*, the Courts of Singapore applied the approach taken in *The Eleftheria*. (See *The Maldive Importer* [1986] 1 MLJ 12; *The Asian Plutus* [1990] 2 MLJ 449.)

Indeed, in *Amerco Timbers Pte Ltd v Chatsworth Timber Corp Pte Ltd* [1977] 2 MLJ 181, Kulasekaram J, delivering the decision of the Singapore Court of Appeal set out factors not entirely dissimilar to those appearing in *The Eleftheria* without the benefit of that case having been cited to him. This is how he put it (at pp 181–182):

> The law concerning an application for a stay is clear. Where a plaintiff sues in Singapore in breach of an agreement to submit their (sic) disputes to a foreign court, and the defendant applies to (sic) a stay, the Singapore court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. The court in exercising its discretion should grant the stay and give effect to the agreement between the parties unless strong cause is shown by the plaintiff for not doing so. To put it in other words the plaintiff must show exceptional circumstances amounting to strong cause for him to succeed in resisting an application for a stay by the defendant. In exercising its discretion the court should take into account all the circumstances of the particular case. In particular, the court may have regard to the following matters, where they arise:
>
> (a) In what country the evidence on the issues of fact is situated or more readily available, and the effect of that on the relative convenience and expense of trial as between the Singapore and foreign courts.

(b) Whether the law of the foreign court applies and, if so, whether it differs from Singapore law in any material respects. A

(c) With what country either party is connected and, if so, how closely.

(d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.

(e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would: B

(i) be deprived of security for their claim;

(ii) be unable to enforce any judgment obtained;

(iii) be faced with a time-bar not applicable here; or

(iv) for political, racial, religious or other reasons be unlikely to get a fair trial. C

The principles — a summary

There is much to be said in favour of leaving the law upon this subject in a state of certainty. Equally, it is also desirable that there be uniformity in D the common law. No decision has been cited to us to show that the *The Eleftheria* test has been questioned in the jurisdiction from which it emanates or, for that matter, in any other jurisdiction. It must not be forgotten that what is under consideration is the discretionary power of a court to stay proceedings. The advantages of leaving the question of whether a stay should be granted or refused with the judge of first instance has not found E any insuperable difficulty in other areas of the law where discretionary relief is sought and I am therefore of the view that no exception is warranted in this area of the law.

To summarize, the relative merits of having a trial either in this country or in the agreed foreign tribunal as well as the competing F considerations that have to be weighed in the balance when deciding whether to give effect to a forum selection clause or to ignore it are matters pre-eminently within the province of the trial judge. Usually in this type of case, evidence is almost always given on affidavit with hardly any question of credibility arising. Since each case depends on its own facts, little or no G assistance is to be derived from a copious citation of other decided cases. The judge should be allowed to read, in the quiet of his chambers, the evidence filed in the case and the argument that is addressed to him should be crisp and brief. An appeal should be rare and this court will be slow to interfere with the discretion exercised by the judge unless, of course, it can be demonstrated to a conviction that the case is one that falls within the H category of cases in which appellate interference is called for.

Reasons for rejecting Zapata

The principal reason for my refusal to accept counsel's invitation to apply the Zapata test is the juridical impossibility of incorporating it into our I common law. A close examination of the American jurisprudence will reveal the difficulties involved.

Traditionally, courts in the United States treated forum selection clauses as being void against public policy. (See *Nute v Hamilton Mutual*

Insurance Co (1856) 72 Mass 174; *Carbon Black Export Inc v The SS Monrosa* 254 F 2d 297.)

This approach was jettisoned by the decision of the Supreme Court in *Zapata* (1972) 407 US 1 where the facts were these. The plaintiff and defendant entered into a contract for the towing of an ocean-going drilling rig from Louisiana to Italy. A clause in the contract provided that 'any dispute arising must be treated before the London court of justice'. The rig was damaged at sea and was towed to Tampa, Florida where the plaintiff, in disregard of the forum selection clause, filed proceedings in the admiralty side of the Federal District Court. The defendant, who had in the meantime commenced proceedings in London for breach of the towage contract, applied to stay the Florida action. The federal district judge held, following previous authority, that discretion should be exercised in the plaintiffs favour and for that reason refused a stay. The Court of Appeals affirmed that decision. The defendant then, in accordance with the appellate procedure obtaining in the United States, petitioned the Supreme Court for certiorari to quash the decision of the Court of Appeals. The Supreme Court granted certiorari to review, and, after hearing argument, vacated the judgment appealed against.

The majority opinion of the court (with Douglas J dissenting) was delivered by Warren Burger CJ. This is what he said (at p 12):

> The argument that such clauses [meaning exclusive jurisdiction clauses] are improper because they tend to 'oust' a court of jurisdiction is hardly more than a vestigial legal fiction. It appears to rest at core on historical judicial resistance to any attempt to reduce the power and business of a particular court and has little place in an era when all courts are overloaded and when businesses once essentially local now operate in world markets. It reflects something of a provincial attitude regarding the fairness of other tribunals. No one seriously contends in this case that the forum selection clause 'ousted' the District Court of jurisdiction over Zapata's action. The threshold question is whether that court should have exercised its jurisdiction to do more than give effect to the legitimate expectations of the parties, manifested in their freely negotiated agreement, by specifically enforcing the forum clause.
>
> *There are compelling reasons why a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power, such as that involved here, should be given full effect.* (Emphasis added.)

Later, at pp 17–18 of the report he made the following observation:

> This case, however, involves a freely negotiated international commercial transaction between a German and an American corporation of towage of a vessel from the Gulf of Mexico to the Adriatic Sea. As noted, selection of a London forum was clearly a reasonable effort to bring vital certainty to this international transaction and to provide a neutral forum experienced and capable in the resolution of admiralty litigation. Whatever 'inconvenience' Zapata would suffer by being forced to litigate in the contractual forum as it agreed to do was clearly foreseeable at the time of contracting. In such circumstances it should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be gravely difficult and inconvenient that he will for all practical purposes be deprived of his

> day in court. *Absent that there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain.* (Emphasis provided.)

Douglas J, recorded his dissent in the following words:

> Respondent is a citizen of this country. Moreover, if it were remitted to the English court, its substantive rights would be adversely affected ... Moreover, the casualty occurred close to the District Court, a number of potential witnesses, including respondent's crewmen, reside in that area, and the inspection and repair work were done there. The testimony of the tower's crewmen, residing in Germany, is already available by way of depositions taken in the proceedings.
>
> All in all, the District Court judge exercised his discretion wisely in enjoining petitioners from pursuing the litigation in England.

I have underscored the passages in the judgment of the learned Chief Justice of the United States that obviously influenced the Court of Appeal of Singapore in the *Vishva Apurva* [1992] 2 SLR 175 in arriving at the conclusion that it did. I may add that these passages reflect American jurisprudence in respect of those elements that go to vitiate a contract.

It follows that on a realistic application of the test formulated by the majority in *Zapata*, a judge hearing an application for a stay mounted on a forum selection clause would have no discretion at all in the matter. He may only refuse a stay on grounds sufficient to avoid a contract, that is to say, grounds that effectively negate consent. The rule is stated in terms so absolute (save for limited exceptions going to the issue of consent) that the area of discretion that is supposed to be vested in a judge is reduced to vanishing point and, for all practical purposes, ceases to exist. These points were well brought out by my learned brother Mahadev Shankar JCA, during the hearing of the appeal and Mr Ong, under the pressure of argument, had perforce to retreat from the extreme position he had originally taken.

An adoption of the Zapata test by this court would, in my respectful view, put at risk respected and high authority, both in this country and elsewhere (to which reference has already been made) that recognize a wide discretion in a judge hearing an application for a stay.

I do not for a moment suggest that the Zapata test may not be applied effectively by American courts in the refusal of a stay. For, their concept of fraud is much wider than ours and would appear to include an ordinary breach of contract. (See *Dynamics Corp v The Citizens & Southern National Bank* 356 F Supp 991 (1973.) Similarly, their doctrine of undue influence differs in material respects from that administered by our courts. (See, for example, the judgment of Brown J in *Pope Manufacturing Co v Gormully* 144 US 224.) Thus, although the labels ascribed to the several vitiating elements, such as fraud and undue influence may be identical, the content of those doctrines differs in essence as between Malaysia and the several jurisdictions that make up the United States.

It follows that circumstances sufficient to avoid a contract under American law, if established before a Malaysian court, may be inadequate to vitiate a contract under our *lex fori*. The important differences that exist

between Malaysian and any foreign jurisprudence should always be borne in mind when deciding whether to incorporate the foreign principle into our common law. There are inherent dangers in importing a foreign doctrine and then subjecting it to the limitations of the municipal law. Due regard must always be had to the manner in which the foreign court applies a particular principle in its domestic context. There must either be an acceptance of the entire jurisprudence upon a subject or a rejection of it in its totality: no piecemeal reception should be entertained.

If I were to accede to the argument of counsel, it would mean rewriting our law of contract. Quite apart from having to throw overboard principles already well entrenched in our law, I may also have to resort to judicial disobedience to the will of Parliament as expressed in the Contracts Act 1950. I am not prepared to do this. If by my refusal I am to be consigned to the category of timorous souls, then I must, following the example of Asquith LJ, accept that fate with such fortitude that is at my command. Better such a fate than to be ranked amongst those who rush in where angels fear to tread.

Forum selection and forum non conveniens

It is now necessary to deal with the differences that exist between applications based on the doctrine of forum non conveniens and those based on forum selection clauses

I begin by recognizing that the law has not yet reached the stage where uniform principles are to be applied to both types of cases. And I do not regard the decision of the Federal Court in *American Express* as having created such an inroad into this area of the law where both principle and authority tell against the unification of approach. (See *Trendtex Trading* [1980] 3 All ER 721; [1982] AC 679 (HL).)

In the former, proceedings are properly commenced in this country. The defendant then applies to stay them on the ground that there exists elsewhere a forum that is more convenient to adjudicate upon the dispute. The burden is therefore on the defendant to demonstrate why the suit should not proceed to disposal in the place where it has been commenced.

In the latter, the plaintiff brings an action here in breach of an agreement to resolve the dispute in a foreign tribunal. The court is, of course, not bound to give effect to such an agreement. A forum selection agreement is to be treated upon the same footing as an agreement that confers jurisdiction. Since consent cannot create or confer jurisdiction upon a court that has none, it also cannot oust the jurisdiction that is properly seised of litigation. I draw support for this view from the judgment of Lord Denning in *The Fehmarn* [1958] 1 All ER 333; [1958] 1 WLR 159. Although that judgment has been criticized by academicians (see the articles in (1958) 7 ICLQ 599 and (1977) 26 ICLQ 825 at p 851) and by counsel for the appellant before us, I respectfully agree with the views expressed by Lord Denning and gratefully adopt them as my own.

Having said all that, once the defendant invokes the agreement, the burden is on the plaintiff to show why the agreement should not be

honoured. But there the difference ends. For, the matters that are relevant to the exercise of discretion in both cases are almost identical. This is well illustrated by *The Frank Pais* [1986] 1 Lloyd's Rep 529.

That was a case where an application was made to stay an action on two grounds. The first was based on a clause in the bill of lading which, inter alia, required all disputes to be decided in the country where the carrier (the defendant in that case) had his principal place of business. The defendant in that case had his principal place of business in Havana, Cuba. The second ground was that England was forum non conveniens. Sheen J rejected the argument mounted on the contractual provision and in doing so he applied the statement of the law in *The El Amria* [1981] 2 Lloyd's Rep 119. This is what he said:

> The defendants move the court for a stay on the alternative ground of 'forum non conveniens'. The matters which have to be considered by the court when exercising its discretion whether to give effect to an agreement to refer disputes to a foreign court include those matters which are relevant to an application to stay on this alternative ground of forum non conveniens. As the plaintiffs have discharged the burden of showing strong grounds why I should not grant a stay of this action despite the agreement that any dispute should be decided in Cuba, it follows that the defendants would be unable to discharge the burden upon them of showing that, in the absence of such an agreement, this action ought to be stayed.

In the present state of the law, I am unable to say that the approach adopted by Sheen J is wrong.

The present appeal

That brings me to the present appeal.

In my judgment, the learned judge has committed no error in the way in which he stated the law. He took into account the fact that the vessel and the appellant are both Malaysian. The cargo was loaded at a Malaysian port. The evidence is admittedly both here and in Manila. But the judge took this into account and came to the conclusion that trial in this country will be less expensive and more convenient. His judgment discloses that he was conscious of the burden on the respondent to produce strong grounds to displace the forum that had been selected. He asked himself all the right questions and, acting in obedience to binding precedent, came to the conclusion that there ought not to be a stay.

In these circumstances, we were satisfied that this is not a case for appellate interference. We therefore dismissed the appeal and made those consequential orders that usually follow a dismissal.

Appeal dismissed.

Reported by Anne Khoo